Foo Yau Lim & Ors v Dato' Han Joke Kwang & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2218 OF 2012
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
29 NOVEMBER 2013

Civil Procedure — Appeal — Appeal against judgment of the High Court — Non-compliance of statutory provisions — Whether annual general meeting null and void — Whether election of parties effective — Statutory regime covering management corporations — Whether internal remedies exhausted before coming to court — Whether procedure laid out in Strata Title Act 1985 followed

The first respondent ('the plaintiff') was the proprietor of one unit of an apartment ('Anjung Hijau Apartments') while the second respondent ('the first defendant') was the management corporation of the same apartment. The first to seventh appellants ('the second to eighth defendants') were the council members of the second respondent. The management corporation of Anjung Hijau held its adjourned first annual general meeting ('AGM') on 5 July 2008; the adjourned second AGM on 11 October 2009 and the adjourned third AGM on 9 October 2010. The dispute was in relation to the third AGM. The plaintiff contended that the conduct of the third AGM by the defendants was in contravention of the statutory provisions in Strata Title Act 1985 ('the Act'). In the High Court, the plaintiff contended that the non-compliance with the material statutory provisions with regard to the conduct of the third AGM had rendered the third AGM null and void and the purported election of the second to eight defendants of no effect. The High Court concluded that the net result of the failures to observe the statutory requirements regarding the election of the council members; the audited requirement regarding the election of the council members; the audited financial statement and the resolutions must necessarily be that the prayers relating to them must succeed and that they must be granted in terms. The plaintiff was thus granted prayers sought. Hence, the present appeal by the second to eighth defendants, raising the issue of statutory regime covering management corporations.

Held, allowing the appeal with costs of RM100,000:

(1) The High Court had acknowledged the need for the plaintiff to avail himself of the remedy as found in the statutory regime when the judge made the finding that the plaintiff had exhausted his internal remedies before coming to the court. However, the plaintiff had not in fact exhausted the internal remedies before coming to the court (see para 24).

(2) The Commissioner of Building had informed the first defendant about the complaints received by the commissioner and had requested the first defendant to give its feedback. The Commissioner of Building vide an email had stated that a meeting would be held between the parties to resolve the matters. If there was no resolution, the relevant party was advised to commence proceedings in any court with competent jurisdiction. However, without waiting for the meeting or for any resolution by the Commissioner of Building, the plaintiff had filed the originating summons. Hence, the plaintiff could not possibly be said to have exhausted the internal remedies before coming to the court. The plaintiff did not follow the procedure set out in the Act, intended to avoid costly litigation between management corporations and owners of strata title units (see paras 28–29).

[Bahasa Malaysia summary

Responden pertama ('plaintif') adalah tuan punya unit apartmen ('Anjung Hijau Apartments') manakala responden kedua ('defendan pertama') adalah perbadanan pengurusan untuk apartmen yang sama. Perayu-perayu pertama hingga ketujuh ('defendan-defendan kedua hingga kelapan') adalah ahli-ahli jawatankuasa responden kedua. Perbadanan pengurusan Anjung Hijau Apartments telah mengadakan mesyuarat agung tahunan pertama yang ditangguh ('MAT') pada 5 Julai 2008; MAT kedua yang ditangguhkan pada 11 Oktober 2009 dan MAT ketiga yang ditangguhkan pada 9 Oktober 2010. Pertikaian adalah berkaitan MAT ketiga. Plaintif berhujah bahawa MAT ketiga yang dijalankan oleh defendan-defendan adalah bertentangan dengan peruntukan statutori dalam Akta Hak Milik Strata 1985 ('Akta tersebut'). Di Mahkamah Tinggi, plaintif berhujah bahawa ketidakpatuhan kepada peruntukan statutori yang penting berkaitan MAT ketiga yang diadakan itu telah menjadikan MAT ketiga itu terbatal dan tidak sah dan pemilihan bagi maksud itu berhubung defendan-defendan kedua hingga kelapan tiada kesan. Mahkamah Tinggi membuat kesimpulan bahawa akibat kegagalan untuk meneliti keperluan statutori berkaitan pemilihan ahli-ahli jawatankuasa; keperluan untuk pengauditan berkaitan pemilihan ahli-ahli jawatankuasa; penyata kewangan yang diaudit dan resolusi-resolusi hendaklah permohonan-permohonan berkaitan dengan yang berjaya dan bahawa mereka hendaklah dibenarkan berbuat demikian. Plaintif oleh itu telah membenarkan permohonan yang dipohon. Justeru, rayuan ini oleh defendan-defendan kedua hingga kelapan, yang menimbulkan isu rejim statutori meliputi perbadanan pengurusan.

Diputuskan, membenarkan rayuan dengan kos RM100,000:

(1) Mahkamah Tinggi mengakui keperluan untuk plaintif memperoleh remedi sebagaimana didapati dalam rejim statutori apabila hakim membuat penemuan bahawa plaintif telah menggunakan remedi

dalamannya sebelum ke mahkamah. Walau bagaimanapun, plaintif sebenarnya tidak menggunakan kesemua remedi dalaman sebelum ke mahkamah (lihat perenggan 24).

(2) Pesuruhjaya Bangunan telah memberitahu defendan pertama tentang aduan-aduan yang diterima oleh Pesuruhjaya dan telah meminta defendan pertama memberi maklum balas. Pesuruhjaya Bangunan melalui emel telah menyatakan bahawa satu mesyuarat akan diadakan antara pihak-pihak untuk menyelesaikan perkara tersebut. Jika tiada resolusi, pihak berkaitan dinasihatkan untuk memulakan prosiding di mana-mana mahkamah dengan bidang kuasa kompeten. Walau bagaimanapun, tanpa menunggu mesyuarat atau apa-apa resolusi oleh Pesuruhjaya Bangunan, plaintif telah memfailkan saman pemula. Justeru, plaintif tidak mungkin boleh dikatakan telah menggunakan semua remedi dalaman sebelum ke mahkamah. Plaintif tidak mengikuti prosedur yang ditetapkan dalam Akta tersebut, dengan niat untuk mengelakkan kos litigasi yang tinggi antara perbadanan-perbadanan pengurusan dan pemilik-pemilik unit-unit strata itu (lihat perenggan 28–29).]

Notes

For cases on appeal against judgment of the High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Perbadanan Pengurusan Menara Gurney & Ors v Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor [2011] 6 CLJ 583, HC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007
Strata Title Act 1985 ss 4, 41, 44(2), Second Schedule

Appeal from: Originating Summons No R1–24–60 of 2011 (High Court, Kuala Lumpur)

Logan Sabapathy (Yan Tai Hwa and Tan Lin Choon with him) (Tai Hwa & Co) for the first, second, third, fifth, sixth and seventh appellants.
Christopher Lai King Lung (Chris Lai, Yap & Partners) for the first respondent.
Yee Fei Churn (Farrahanie Yasmin bt Ahmad Yusoff with him) (Davis & Low) for the second respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The first respondent (the plaintiff in the High Court) is the proprietor of one unit of an apartment known as Anjung Hijau Apartments at Bukit Jalil,

Kuala Lumpur. The second respondent (the first defendant in the High Court) is the Management Corporation of Anjung Hijau established under the Strata Title Act 1985 (Act 318). The first to the seventh appellants (the second to the eighth defendants in the High Court) were the council members of the second respondent purportedly elected at the Third Annual General Meeting (the third AGM) of the Management Corporation of Anjung Hijau.

[2] The Management Corporation of Anjung Hijau had held its Adjourned First Annual General Meeting on 5 July 2008; the Adjourned Second Annual General Meeting on 11 October 2009 and the Adjourned Third Annual General Meeting on 9 October 2010. The dispute in this matter relates to the third AGM of the Management Corporation of Anjung Hijau. In this judgment, parties will hereinafter be referred to as they were in the High Court.

[3] The notice dated 5 September 2010 calling for the third AGM states the agenda for the third AGM as follows:

(a) election of Chairman for the Meeting;

(b) confirmation of Minutes of the Second Annual General Meeting;

(c) to receive the Audited Financial Statements for the Year ended 30 June 2010;

(d) to re-appoint Messrs Azman Ahmad & Co as the Corporation's Auditors;

(e) to discuss and, if deem fit, to adopt Resolutions;

(f) any other Matters; and

(g) election of Council Members.

[4] The plaintiff contended that the conduct of the third AGM by the defendants was in contravention of the statutory provisions in Act 318.

[5] On 7 June 2011, the plaintiff filed an originating summons in the High Court seeking for the following orders against the defendants:

(a) Satu Declarasi bahawa Mesyuarat Agung tahunan ke 3 tertunda yang diadakan pada 9 Oktober, 2010 adalah tidak sah, salah dan terbatal;

(b) Satu Declarasi bahawa Agenda tiga, lima dan tujuh yang cuba dibentangkan pada 9 Oktober, 2010 adalah tidak sah, salah dan terbatal;

(c) Satu Declarasi bahawa Defendan Kedua hingga Defendan Kelapan adalah ahli jawatankuasa Defendan Pertama yang tidak sah, salah dan terbatal dalam Mesyuarat Agung tahunan ke 3 tertunda yang diadakan pada 9 Oktober, 2010;

(d) Satu Declarasi bahawa segala tindakan yang dibuat, diputuskan, dilaksanakan oleh Defendan Kedua hingga Defendan Kelapan pada atau

selepas 9 Oktober, 2010 adalah tindakan peribadi Defendan Kedua hingga Defendan Kelapan yang tidak sah dan terbatal, salah serta ultra vires kedudukan mereka dan tidak mengikat Defendan Pertama;

(e) Satu Declarasi bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki menanggung segala liability, gantirugi atau kos yang timbul bersama dan berasingan, sekiranya ada kepada Defendan Pertama pada atau selepas 9 Oktober, 2010 akibat tindakan Defendan Kedua hingga Defendan Kelapan yang tidak sah dan ultra vires kedudukan mereka;

(f) Suatu injunksi bahawa Defendan Kedua hingga Defendan Kelapan dilarang samada melalui mereka sendiri, pekerja-pekerjanya, agent atau orang lain untuk merepresentasi bahawa mereka adalah ahli jawatankuasa yang sah bagi Defendan Pertama dengan serta merta;

(g) Suatu Perintah bahawa Profesor Dr Ho Ban Lee dilantik sebagai Pentadbir untuk Defendan Pertama bagi tempoh masa setahun dari tarikh Perintah ini dengan serta merta;

(h) Suatu Perintah bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki membayar kos atas dasar indemniti peguam-anakguam penuh kepada Plaintif secara bersama dan berasingan dalam tindakan ini dengan serta merta;

(i) Suatu Perintah bahawa Defendan Kedua hingga Defendan Kelapan dikehendaki membayar segala gantirugi dan kos yang timbul dalam tindakan ini sekiranya ada kepada Plaintif dengan serta merta;

(j) Suatu Perintah bahawa Defendan-Defendan dikehendaki membayar Faedah pada kadar 8% setahun dari tarikh penghakiman untuk prayer lapan (8) dan prayer Sembilan (9) di atas sehingga ke tarikh penyelesaian penuh;

(k) Relif-relif selanjutnya atau Iain-Iain yang mana difikirkan oleh Mahkamah yang Mulia sebagai suaimanfaat.

IN THE HIGH COURT

[6] In the High Court, it was the case for the plaintiff that the non-compliance with the material statutory provisions with regard to the conduct of the third AGM had rendered the third AGM null and void and the purported election of the second to the eighth defendants of no effect.

[7] The main issues for consideration by the High Court pertaining to the non-compliance by the defendants of the provisions, particularly, of the Second Schedule of Act 318 were in respect of agenda No 3, No 5 and No 7 in the notice for the third AGM ie the audited financial statement for the year ending 30 June 2010; the discussion and passing of resolutions and the election of council members respectively.

[8] In respect of the audited financial statement, the complaint of the plaintiff was that the same was not tabled at the third AGM. What was tabled was merely a summary of the audited financial statement for the year ending 30 June 2010.

[9] Making reference to paras 7(3), (4) and (5)(a) and para 8 of the Second Schedule of Act 318, the High Court opined that what was envisaged by the interplay between those paragraphs must be an audited account and not a summary of the account of the management corporation.

[10] Paragraph 7 of the Second Schedule provides:

> (3) The council shall prepare for each annual general meeting, proper accounts relating to all moneys of the corporation and the corporation's income and expenditure.
>
> (4) The accounts of the corporation shall be audited annually by auditors appointed by the council.
>
> (5) The council shall within twenty-eight days of a general meeting file with the Commissioner certified true copies of:
>
> (a) the audited accounts of the corporation which has been presented to the general meeting.

[11] Paragraph 8(1) provides:

> (1) The corporation shall hold an annual general meeting for the consideration of accounts, election of the council and the transaction of such other business as may arise.

[12] In light of paras 7 and 8 quoted above, the High Court held that the provisions on the audited account were not fully complied with thereby rendering the third AGM null and void.

[13] On the resolutions, the issue involved the manner in which they were tabled and passed during the third AGM. The plaintiff contended that under Act 318, residents should be given fourteen days notice in advance specifying the proposed resolution prior to passing any resolution. Objections were in fact taken at the third AGM in that there was a statutory procedure to be followed before the proposed resolutions could be tabled for deliberation at the AGM. The complaint was that the second defendant who acted as the Chairman at the third AGM ignored the objection and proceeded to move the resolutions where four out of the eight resolutions were passed. The plaintiff contended that those acts on the resolutions were ultra vires and of no effect.

[14] The High Court agreed with the plaintiff that the resolutions were improperly tabled. The High Court found that the passing of the resolutions that had not been brought before the third AGM in accordance with the dictates of the legal provisions and the subsequent dealings on those resolutions by the chairman must necessarily be null and void for being ultra vires, in contravention of ss 4 and 44(2) of Act 318.

[15] Section 4 is the definition section where it states:

> 'special resolution' means a resolution which is passed at a duly convened general meeting of a management corporation of which at least fourteen days' notice specifying the proposed resolution has been given by the management corporation or by proprietors who together are entitled to not less than one-quarter of the aggregate share units and who together constitute not less than one-quarter of the membership of the management corporation.

[16] Section 44(2) provides:

> The management corporation may by special resolution make additional by-laws, or make amendments to such additional by-laws, not inconsistent with the by-laws set out in the Third Schedule, for regulating the control, management, administration, use and enjoyment of the subdivided building or land.

[17] Insofar as the issue of election of council members is concerned, the contention of the plaintiff was that during the third AGM, there was no election of the second to the eighth defendants as council members.

[18] The High Court found that, firstly, the need for an election during an AGM was a statutory requirement. Secondly, if at all, from the minutes of the third AGM, there was no record that there was a motion to regard the nominated members as deemed elected council members of Anjung Hijau and that there was a consensus from all the proprietors to that effect. What had happened was that the defendants were nominated to stand in the election, but that was as far as the process went. The High Court found that this process could hardly be qualified as a properly run AGM and that there was a failure to comply with the requirements of paras 13–16 of the Second Schedule of Act 318.

[19] Paragraph 13 provides for the manner of deciding questions at general meeting; para 14 is on proxy; para 15 provides for the voting rights of proprietor whereas para 16 provides for voting rights of co-proprietors.

[20] The High Court concluded that the net result of the failures to observe the statutory requirements regarding the election of the council members; the

audited financial statement and the resolutions must necessarily be that the prayers relating to them must succeed and that they must be granted in terms therein. The plaintiff was thus granted the prayers sought for in the originating summons with costs of RM20,000 as costs thrown away and RM150,000 as indemnity costs to the plaintiff, to be paid by the second to the eighth defendants collectively. Against the said decision, the second to the eighth defendants appealed to the Court of Appeal.

THE APPEAL

[21] Before us, the issues raised by the second to the eighth defendants concern, essentially, the statutory regime covering management corporations. It was the submission of learned counsel for the second to the eight defendants that the dispute arises in the context of a factional fight and that such dispute is to be regulated by the Commissioner of Building under Act 318 and that the court has limited jurisdiction in matters of dispute between proprietors. Learned counsel argued that the statutory regime does not allow the proprietors to sue the council members but it is for the regulators to take action against the council members. In support of this argument, learned counsel had relied on the case of *Perbadanan Pengurusan Menara Gurney & Ors v Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor* [2011] 6 CLJ 583 where, in reference to the Building and Common Property (Maintenance and Management) Act 2007 (Act 663), John Louis O'Hara J states:

> … it is now my intention to address s 41 of Act 663. Act 663 is a special and specific piece of legislation enacted by Parliament to provide for the proper maintenance and management of buildings and common property in West Malaysia and Labuan. Section 3 provides for the appointment of a Commissioner of Buildings, and s 41 reads as follows:
>
> 41. Appeals to the State Authority
>
> Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision to the State Authority (sic); and the decision of the State Authority shall be final and shall not be questioned in any Court. The words 'Commissioner under this Act' means the 'Building Commissioner appointed under Act 663'. It is therefore my decision that the act or decision caught by s. 41 is any decision made by the Building Commissioner under the Act 318 or the Act 663.
>
> There is a plethora of case law that lays down the principle which when applied to the circumstances of this case dictate that the applicants should avail itself of the remedy under s 41 rather than go by way of judicial review. To hold otherwise would tantamount to deliberately frustrating the clear intentions of legislature which has enacted this provision at the behest of the executive. This is not just a case of s 41 being an alternative remedy. It is clear to me that having regard to the purpose and intent of Act 663 and the specific enactment of a provision in terms of s 41, that

Parliament intended that parties who are aggrieved by any act or decision of the Commissioner, appeal to the State Authority.

[22] Section 41 of Act 663 is reproduced below as the section quoted above had some missing words:

41. Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision, appeal against that action or decision to the State Authority; and the decision of the State Authority shall be final and shall not be questioned in any court.

[23] The plaintiff was conscious of the statutory regime concerning management corporation as evident from the letters dated 25 October 2010 (exh P8); 2 November 2010 (exh P7) and 20 April 2011 (exh P6) where the plaintiff and one Liew Yeon Keong had raised complaints with the Commissioner of Building in respect of the conduct of the defendants which was alleged to be invalid and not in accordance with Act 318.

[24] The High Court had also acknowledged the need for the plaintiff to avail himself of the remedy as found in the statutory regime when His Lordship made the finding that the plaintiff had exhausted his internal remedies before coming to the court.

[25] Having perused the affidavits filed in respect of the originating summons and the exhibits annexed thereto, we however find that the plaintiff had not in fact exhausted the internal remedies before coming to the court.

[26] In a letter dated 2 November 2010 (exh P7) to the Commissioner of Building, Liew Yeon Keong had stated, inter alia:

… I would appreciate it if the Commissioner of Building (COB) will conduct an investigation into my complaint and that of other residents and make a ruling with regards to implementation of By Laws by PPAH that are not in compliance with the Strata Titles Act. I also wish to propose that the COB direct PPAH under section 9(b) of the Second Schedule of the Strata Titles Act to convene an extraordinary general meeting to discuss and resolve all the By Laws and appoint an independent moderator (who is familiar with the pertinent statutes and legislations) to chair the EGM to ensure that the EGM is conducted properly and fairly without basis, fear or favour.

[27] Indeed, para 9(3) of the Second Schedule of the 1985 Act provides:

> Where the Commissioner is satisfied that the council has not been properly constituted, he may authorise in writing any proprietor to convene an extra-ordinary general meeting for such purposes as may be approved by the Commissioner.

[28] Vide a letter dated 3 May 2011, the Commissioner of Building had informed the first defendant about the complaints received by the commissioner and had requested the first defendant to give its feedback. And in response to the request from one Ban Lee Ho for a meeting, the Commissioner of Building vide an email dated 13 June 2011 had stated:

> … pihak COB akan mengadakan mesyuarat bagi kedua-dua pihak dalam mencari jalan penyelesaian. Sekiranya tiada jalan penyelesaian, pihak yang terbabit dinasihatkan agar memulakan prosiding di dalam mana-mana mahkamah yang berbidang kuasa kompeten.

[29] However, without waiting for the meeting or for any resolution by the Commissioner of Building, the plaintiff had, on 7 June 2011 filed the originating summons. Hence, it is our view that the plaintiff could not possibly be said to have exhausted the internal remedies before coming to the court. The plaintiff did not follow the procedure set out in Act 318, intended to avoid costly litigation between management corporations and owners of strata title units.

[30] In the circumstances, we allowed the appeal and set aside the order of the High Court with costs of RM100,000 here and below.

Appeal allowed with costs of RM100,000.

Reported by Afiq Mohamad Noor